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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1956

No. 291

W. A. CANNON, PETITIONER,

v.

NORTH CAROLINA STATE HIGHWAY AND PUBLIC WORKS COMMISSION, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

BRIEF FOR RESPONDENT IN OPPOSITION

R. BROOKES PETERS, *General Counsel,*
North Carolina State Highway and
Public Works Commission,
11 South Wilmington Street,
Raleigh, North Carolina

AUGUST 27, 1956

INDEX

Page

Opinions Below 1

Jurisdiction 1

Questions Presented 2

Laws Involved 2

Statement 2

Argument 3

I. That there is no federal question involved and that he has never brought himself under the provisions of the federal statute 3

II. That there was no proceeding properly instituted 3

Conclusion 11

Appendix

Letter to Chief Justice Barnhill 12

CITATIONS

Cases:

BEAR v. COMMISSIONERS, 124 NC 204, 32 SE 558 ..... 5, 9

BLEDSOE v. THE STATE, 64 NC 392 ..... 6, 7

BOARD OF MANAGERS OF JAMES WALKER MEMORIAL HOSPITAL v. WILMINGTON, 235 NC 597, 70 SE 2d 833 6

CALKINS DREDGING CO. v. STATE, 191 NC 243, 131 SE 665 7

CENTRAL VERMONT RAILWAY CO. v. WHITE, 238 US 507, 59 L. ed. 1433 4

CHICAGO v. HASLEY, 25 Ill. 595 5

MARYLAND CASUALTY CO. v. COMRS. OF SALUDA, 214 NC 235, 199 SE 7 5

REYNOLDS v. THE STATE, 64 NC 460 ..... 6, 7

ROTAN v. STATE, 195 NC 291, 141 SE 733 7

SOUTHWESTERN BELL TELEPHONE CO. v. STATE OF OKLAHOMA, 303 US 206, 82 L. ed. 751, 755 4

UNITED STATES v. OSWEGO, 28 Fed. 55 5

WILKINSON v. BOARD OF EDUCATION, 199 NC 669, 155 SE 562 6

Constitution:

N. C. Const., Art. IV, § 9 5

Statutes:

28 USC § 1257(3) 4

G. S. § 1-1 9

G. S. § 1-2 9

G. S. § 1-3 9

G. S. § 1-88 9

G. S. § 1-88.1 10

G. S. § 1-393 10

G. S. § 1-394 10

G. S. § 1-511 9

G. S. § 7-8 5

G. S. § 7-9 5

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OPINIONS BELOW

There has been issued no opinion in the instant case unless the order entered 21 March, 1956, denying petitioner the relief prayed for should be so considered. That order appears as Appendix "C," Petitioner's Brief, p. 23. The opinion in the original case, entitled "W. A. CANNON v. CITY OF WILMINGTON, NORTH CAROLINA, and NORTH CAROLINA STATE HIGHWAY AND PUBLIC WORKS COMMISSION," filed 12 October, 1955, is reported in 242 NC 711, (89 SE 2d 595). (Br. Appendix "B," pp 18-22).

JURISDICTION

The jurisdiction of this Court is sought to be invoked under the provisions of 28 USC § 1257(3). It is doubtful that a federal question is presented.

QUESTIONS PRESENTED

I. WHETHER THERE IS ANY FEDERAL QUESTION INVOLVED.

II. WHETHER ANY PROCEEDING FOR MANDAMUS HAS EVER BEEN PROPERLY INSTITUTED.

LAWS INVOLVED

The Federal Statute under which the jurisdiction of this Court is attempted to be invoked is 28 USC § 1257(3).

The statutory provisions involved are North Carolina General Statutes, § 1-1; § 1-2; § 1-3; § 1-88; § 1-88.1; § 1-393; § 1-394; § 1-511; § 1-513; § 136-18 and § 136-19.

STATEMENT

On the 28th day of February, 1955, the petitioner brought a civil action in the Superior Court of New Hanover County against the City of Wilmington, North Carolina, and the North Carolina State Highway and Public Works Commission, in which the petitioner, therein designated "plaintiff," sought to remove an alleged cloud on title to a portion of a certain piece of property located in the City of Wilmington. In apt time the North Carolina State Highway and Public Works Commission and the City of Wilmington each filed a demurrer. The demurrers were heard by the presiding judge at the May, 1955, Term of the New Hanover County Superior Court and both demurrers were sustained. Plaintiff appealed to the Supreme Court of North Carolina. By opinion filed 12 October, 1955, the Supreme Court affirmed the judgment sustaining the demurrer as to the Commission and reversed the judgment sustaining the demurrer as to the City of Wilmington. (CANNON v. WILMINGTON, 242 NC 711, 89 SE 2d 595; Appendix B, pp 18-22, Petitioner's Brief.)

On or about 20 March, 1956, petitioner, therein designated "plaintiff," filed a complaint with the Supreme Court of North Carolina seeking a writ of mandamus against the Governor of the State and the State Highway and Public Works Com-

mission, (Transcript pp 1-6) to which complaint were attached three exhibits. (Transcript pp 7-9) No summons was issued. (Transcript pp 10-11) Order was entered 21 March, 1956, by the Court denying the relief sought. (Transcript p 12). It is this order that petitioner seeks a writ of certiorari to have this Court review. (Petitioner's Brief p 1).

ARGUMENT

In his brief petitioner enumerates three questions, listing them. (Brief pp 3-4). He divides his argument into three parts:

1. That the decisions of the North Carolina Supreme Court in denying his application for writ of mandamus and in the original case are in conflict with the provisions of the Constitution of the United States, the Constitution of North Carolina and the Statutes of North Carolina; (Brief pp 7-11);

2. That the instant case is of great importance to determine whether these acts conform to the duties of respondent to the people of North Carolina as defined in the State and Federal Constitutions; (Brief pp 12-13) and

3. That the decisions of the Supreme Court below are clearly erroneous. (Brief pp 13-18).

Respondent respectfully contends that petitioner is not entitled to have the writ of certiorari issued by this Court to the Supreme Court of North Carolina on two major grounds:

I. That there is no federal question involved and that he has not brought himself under the provisions of the federal statute.

II. That there was no proceeding ever properly instituted.

I.

WHETHER THERE IS ANY FEDERAL QUESTION INVOLVED.

28 USC § 1257. "STATE COURTS; APPEAL; CERTIORARI. Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commissions held or authority exercised under, the United States."

This Court has "repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it." SOUTHWESTERN BELL TELEPHONE COMPANY v. STATE OF OKLAHOMA, 303 US 206, 82 L. ed. 751, 755. Also that assignments of error which involved no federal question cannot be considered. See CENTRAL VERMONT RAILWAY COMPANY v. WHITE, 238 US 507, 59 L. ed. 1433.

Respondent respectfully contends that there is no federal question involved in the proceeding for which writ of certiorari is now sought. In fact, respondent respectfully contends that no proceeding was ever instituted; that, therefore, the order of the North Carolina Supreme Court from which certiorari is sought is not a final judgment of a State court of last resort.

II.

WHETHER PETITIONER EVER INSTITUTED PROPER PROCEEDING SEEKING A WRIT OF MANDAMUS.

Respondent respectfully contends that petitioner never instituted any proceeding. Petitioner's complaint filed with the Supreme Court of North Carolina on or about the 20th day of March, 1956, was considered by him to be an "application for writ of mandamus." (Brief p 6) It was filed in the Supreme Court of North Carolina under the provisions of Section 9, Article IV, of the Constitution of North Carolina and §§ 7-8 and 7-9 of the General Statutes of North Carolina. (Brief p 6)

North Carolina Constitution, Article IV, § 9 "CLAIMS AGAINST THE STATE.—The Supreme Court shall have the original jurisdiction to hear claims against the State, but its decisions shall be merely recommendatory; *no process in the nature of execution shall issue thereon;* they shall be reported to the next session of the General Assembly for its action." (Emphasis added)

GS 7-8: "ORIGINAL JURISDICTION. The Supreme Court has original jurisdiction to hear claims against the State, but its decision shall be merely recommendatory; *no process in the nature of execution shall issue thereon;* they shall be reported to the next session of the General Assembly for its action." (Emphasis added)

GS 7-9. (See Br. Appendix, pp 4-5)

These statutes have been construed by our Court as follows:

BEAR v. COMMISSIONERS, (1899), 124 NC 204, 207: ". . . though *mandamus is in the nature of an execution,* . . ." (Emphasis added).

CASUALTY CO. v. COMRS. OF SALUDA (1938), 214 NC 235, 238: "*Mandamus* is as much an instrument of enforcement at law as it is an aid in equity and, as sought here, may be considered the equivalent of execution. BEAR v. COMRS., 124 NC 204, 210, 32 SE 558; US v. OSWEGO, 28 Fed. 55; CHICAGO v. HASLEY, 25 Ill. 595."

HOSPITAL v. WILMINGTON, (1952) 235 NC 597, 601: "And a writ of *mandamus* is final in its nature. . . . *Mandamus* . . . is essentially a coercive writ; one that commands performance, not desistance. . . . Such writ will not be issued to enforce an alleged right which is in question. . . . *Mandamus* lies only to enforce a clear legal right and will be issued only when there is no other legal remedy. . . . 'The function of the writ is to compel the performance of a ministerial duty—not to establish a legal right, but to enforce one which has been established.' WILKINSON v. BD. OF EDUCATION, 199 NC 669, 155 SE 562."

WILKINSON v. BOARD OF EDUCATION, (1930) 199 NC 669, 673, "The right sought to be enforced must be clear and complete; the writ will not be issued to enforce an alleged right which is in doubt. (Citing cases)"

From these cases, and particularly the BEAR case, it appears that the very Constitutional provision and the statutes which petitioner claims support his right to the writ, contain provisions that would prohibit the Supreme Court from granting the writ prayed for.

BLEDSOE v. THE STATE (1870) 64 NC 392, 394: "Construing the two sections together, we are of the opinion that it was not contemplated that when a claim is presented against the State there shall be a 'trial' of the facts in detail, but only that we should decide such questions of law as may seem to be involved, together with our own impression of the facts generally, so as to make our decision of the law intelligible."

REYNOLDS v. THE STATE (1870) 64 NC 460: "We are fully satisfied, on a perusal of the papers in the proceeding, of the correctness of the view taken in BLEDSOE v. STATE, *ante*, 392, to-wit, that our 'recommendatory jurisdiction' in regard to claims against the State does not embrace cases involving mere matters of fact, and that it was not the intention of the framers of the Constitution to impose upon the Court the labor of the trial of facts, and that the jurisdiction is confined to claims where, the facts being agreed on, it was supposed an opinion of the Supreme Court on important questions of law would aid the General Assembly to dispose of such cases; it having been before a question whether the Judges could, con-

sistently with their constitutional duties, communicate an opinion to the Legislature."

DREDGING COMPANY v. STATE, (1926) 191 NC 243, 249: "The Court has no power to render judgment upon a claim against the State, adjudicating finally the rights of the claimant or of the State with respect to said claim. *No process in the nature of execution may issue upon any decision which the Court may make*, after hearing a claim against the State to enforce the same. The General Assembly is in no wise bound by the decision of this Court upon the validity or invalidity of such claim. It may take such action upon the claim, if presented to it, as it deems just and proper, and in accordance with a sound public policy. The recommendation of this Court will have such influence only upon the action of the General Assembly as its members shall deem it entitled to." (Emphasis added)

In this opinion the Court approved the previous opinions of BLEDSOE v. THE STATE, 64 NC 393, and REYNOLDS v. THE STATE, 64 NC 460, quoted above. (p 250)

In ROTAN v. STATE (1929) 195 NC 291, this Court said, p 296: ". . . the jurisdiction, however, is clearly defined and carefully limited by the provisions of the Constitution. Neither the State nor the General Assembly is bound by any decision made by this Court, with respect to a claim against the State, whether such decision be favorable or unfavorable to the claimant. Our decisions are merely recommendatory. They may be accepted or rejected by the General Assembly, which alone has the power to determine whether or not the claim is just, or whether or not a sound public policy requires that it shall be paid or settled."

pp 296-297: "The Superior Courts of the State had ample jurisdiction with respect to an action by claimants herein to recover of the State or its agency, the Tax Commission, the money paid by them on 2 December, 1920. Claimants did not avail themselves of the right, conferred by statute, to bring such action. The fact that they have lost their right to recover said sum in an action against the State, prosecuted in the Superior Court, furnishes no ground upon which they are entitled to invoke the original jurisdiction of this Court, with respect to their claim. This

Court, in the exercise of its original jurisdiction, conferred by the Constitution, will hear and consider a claim against the State only where the claimant has, or has had, no right of action against the State to recover upon his claim in a court of competent jurisdiction, by the consent of the State, expressly conferred by statute, to render final judgment against the State upon such claim and to enforce such judgment by process in the nature of execution. The jurisdiction of this Court, by virtue of which it may decide only issues of law involved in a claim against the State, its decisions then being only recommendatory, cannot be invoked by a claimant who has failed or neglected to pursue a remedy authorized by statute, which would have afforded him complete relief. Such remedy is exclusive."

In view of the principle laid down in the last opinion quoted above, from some of the allegations of the complaint and from statements in the exhibits attached thereto, it would appear that W. A. Cannon, the petitioner, had a right to bring an action against the Highway Commission when the street or road carrying US 421 across the front of his property was widened under Highway Project 3590 in the year 1939, (Exhibit "B," Transcript, p 9), for compensation for the appropriation of an additional width of right of way, if in fact additional width was appropriated at that time. Having failed to do so then, within the time provided by law, the petitioner had no right to seek relief from the Supreme Court in the manner attempted in this case.

That petitioner had the right at that time was clearly expressed in GS 136-19, which is quoted in its present form in the appendix to petitioner's brief, pp 14-17. The only difference between the section as it existed in 1939 and as it exists today is found in the proviso, which begins after the word "damages" appearing in the next to the bottom line of page 14. As it existed when Project 3590 was completed in 1939, this proviso read as follows: "Provided, that all actions for damages for rights of way or other causes shall be commenced within six months from the completion of each particular project."

Therefore, under the provisions of the Constitution of North Carolina and the Statutes of North Carolina, as interpreted by the Supreme Court of North Carolina, the petitioner had no right to bring the action as he did. Certainly, no federal question is involved in the Supreme Court's denial of his petition.

The statutes of North Carolina provide how a petition for mandamus shall be brought.

GS 1-511: "BEGUN BY SUMMONS AND VERIFIED COMPLAINT. All applications for writs of mandamus must be made by summons and complaint, which must be duly verified."

Our Supreme Court has said: ". . . though *mandamus* is in the nature of execution, yet it is in the nature of a civil action; it is commenced by summons, and the pleadings and the practices are the same as are prescribed for the conducting of civil actions." BEAR v. COMMISSIONERS, (1899) 124 NC 204, 207.

With regard to the definition of a civil action and as to how it should be commenced, our Statutes say:

GS 1-1. "REMEDIES.—Remedies in the courts of justice are divided into—

"1. Actions.
"2. Special proceedings."

GS 1-2. "ACTIONS.—An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense."

GS 1-3. "SPECIAL PROCEEDINGS. — Every other remedy is a special proceeding."

GS 1-88. "CIVIL ACTIONS; HOW COMMENCED. — A civil action is commenced by the issuance of summons or, when service is to be had pursuant to GS 1-98 or 1-104, by the filing of the affidavit therein required. No summons need

issue in a controversy without action or in case of a confession of judgment without action."

GS 1-88.1. "WHEN SUMMONS ISSUED.—A summons is issued when, after being filled out and dated, it is signed by the officer having authority so to do. The date the summons bears is prima facie evidence of the date of issuance."

As to special proceedings:

GS 1-393. "CHAPTER APPLICABLE TO SPECIAL PROCEEDINGS.—The provisions of this chapter on civil procedure are applicable to special proceedings, except as otherwise provided."

GS 1-394. "CONTESTED SPECIAL PROCEEDINGS; COMMENCEMENT; SUMMONS. — Special proceedings against adverse parties shall be commenced as is prescribed for civil actions. . . ."

Petitioner did not follow the procedure prescribed, therefore, respondent contends that no suit—for mandamus or otherwise—was ever properly instituted. If no suit was ever instituted, the order of 21 March, 1956, was no final judgment—no final word of a final court. If it is not a final judgment of a court of last resort, it is not reviewable by this Court.

Before finally concluding respondent respectfully directs the Court's attention to a letter attached as an appendix to this brief. In this letter of December 16, 1955, to the Chief Justice of the North Carolina Supreme Court the General Counsel of respondent relates what had been done, pursuant to the request of the court, to point out to petitioner, his attorney and his surveyor the location of the boundaries of the right of way. This should be considered along with the description appearing in the letter to petitioner's attorney, dated February 10, 1956, EXHIBIT "B" attached to the complaint, (Transcript, p 9), to show compliance with the request of the court to define the boundaries claimed.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted.

R. BROOKES PETERS, *General Counsel*,
North Carolina State Highway and
Public Works Commission,
Raleigh, North Carolina

ATTORNEY FOR RESPONDENT

APPENDIX

December 16, 1955

Hon. M. V. Barnhill
Chief Justice
North Carolina Supreme Court
Raleigh, N. C.

Re: W. A. Cannon v. City of Wilmington, NCSH&PWC
No. 171, Fall Term, 1955.

Dear Justice Barnhill:

You may recall that when the above captioned matter was argued you inquired of me if we could not have our engineers point out to the petitioner the boundaries of the right of way of the highway across the property involved. Our engineers were requested to arrange for a conference with representatives of the City and the petitioner and his attorney, for the purpose of this.

We are today in receipt of a letter from our Right-of-way Engineer for the 3rd Division, whose office is in Wilmington, which says in part as follows:

> "As per your letter of Sept. 21, 1955, Mr. Louis J. Poisson, Jr. and myself met this morning with Mr. Burkheimer, attorney for Mr. Cannon, and pointed out to him and his surveyor, Mr. Lander, the east right-of-way line of US 421, or the Carolina Beach Road, which is the back of a 6' concrete sidewalk which fronts along this property. Also present were Mr. Cicero Yow, city attorney, and Mr. Robert Coleman, city engineer."

We believe now that we have pointed out the right-of-way boundary to the petitioner in a manner which we hope is definite and clear to him and his attorney. We trust that this meets with your approval as sufficient compliance with your request.

With every good wish and personal regards, particularly every good wish for you and yours for this Christmas Season, I remain

Respectfully,

R. BROOKES PETERS
GENERAL COUNSEL

RBP:vl
cc: Mr. T. B. Wilson
Mr. W. D. Moon
Mr. Louis J. Poisson, Jr.